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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1977

NO. 77-447

THE UNIVERSITY OF MISSOURI, et al.,
Petitioners,

vs.

GAY LIB, et al.,
Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

LAWRENCE P. KAPLAN
On Behalf of the
American Civil Liberties
Union of Eastern Missouri
7711 Carondelet, Suite 500
St. Louis, Missouri 63105
Attorney for Respondents

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Petitioners raise in a rather primitive form the question of whether the Eighth Circuit Court of Appeals violated Rule 52(a) of the Federal Rules of Civil Procedure in reversing the District Court.

After discussing the cases of Gay Students Org. of Univ. of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974), and Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976), the Eighth Circuit states:

> Notwithstanding these decisions, defendants assert that the record in this case contains expert medical testimony which provides a legal justification for withholding formal recognition from Gay Lib. They argue, and the district court found, that recognition of Gay Lib would likely result in imminent violations of Missouri sodomy laws. (App. pp. A-9-10)

In footnote 10 the Court of Appeals states as follows:

> Defendants urge that this court must apply the clearly erroneous rule and sustain the district court's credibility assessment of conflicting testimony in view of the fact that there is substantial evidence supporting the court's finding. We reject this approach for several reasons. First, this court is not bound by the district court's credibility evaluation of witnesses where the evidence is submitted by

> deposition or in other documentary form. . . . Second, even under the clearly erroneous rule, this court has a greater latitude of review than it would in an appeal from a jury verdict. . . . Finally, the critical question is not purely factual, but rather is closely intertwined with legal considerations. The inquiry is not merely whether certain events will occur, but rather, whether imminent lawless activity is so likely as to warrant infringement of First Amendment rights. (App. p. A-10)

The Court of Appeals then discusses the testimony of the Petitioners' two expert witnesses and concludes as follows:

> Even accepting the opinions of defendants' experts at face value, we find it insufficient to justify a governmental prior restraint on the right of a group of students to associate for the purposes avowed in their statement and revised statement of purposes. While it is difficult to articulate generalized standards as to the quantum and quality of proof necessary to justify the abridgment of First Amendment rights, the many Supreme Court cases dealing with prior restraints and other First Amendment issues make clear that the restriction of First Amendment rights in the present

> context may be justified only by a far greater showing of a likelihood of imminent lawless action than that presented here. (App. pp. A-12-14) (Footnotes omitted)

When the Eighth Circuit's opinion is read in this manner, it becomes clear that the applicability of the "clearly erroneous" rule of Rule 52(a) of the Federal Rules of Civil Procedure is irrelevant to its decision.

In the case at bar, the trial court's finding of facts shaded into conclusions of law which permitted the Court of Appeals to rule on an "ultimate" fact to which Rule 52(a) does not apply. This Court, in the case of Baumgartner v. United States, 322 U.S. 665 (1944), stated that the conclusiveness of a "finding of fact" depended on the nature of the materials on which the finding was based, and that the finding even of a so-called "subsidiary" fact might be a more or less difficult

process, varying according to the simplicity or subtlety of the type of "fact" in controversy. The Baumgartner Court said that finding so-called "ultimate" facts more clearly implied the application of standards of law, and so the "finding of fact," even if made by courts below, might go beyond the sort of determination that should not be set aside. The Court stated that even though labeled "finding of fact," the determination may involve the very basis on which the judgment of fallible evidence is to be made, and thus the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by a reviewing court.

This Court has also held that Rule 52(a) does not apply to conclusions that are incorrectly drawn from undisputed facts. These become fact or fact-legal

conclusions which are induced by erroneous legal standards. In the case of United States v. General Motors Corp., 384 U.S. 127 (1966), this Court found that the factual conclusion drawn by the trial court from the basic facts was not a "finding of fact" within the meaning of Rule 52(a). In that case, an action to enjoin the defendants from participating in an alleged conspiracy to restrain trade, this Court said that the findings by the trial judge compelled the conclusion that a conspiracy to restrain trade was proved, and that the trial court erred in its failure to apply the correct and established standard for ascertaining the existence of a combination or conspiracy. The General Motors Court noted that the ultimate conclusion by the trial judge was not to be shielded by the "clearly erroneous" test embodied in Rule 52(a) because the question was not

one of "fact," but consisted rather of the legal standard required to be applied to the undisputed facts of the case. Moreover, the Court stated that the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, "which is the rationale behind Rule 52(a)," played only a restricted role in that case, for it was essentially a "paper case." The General Motors Court went on to say that the case did not unfold by the testimony of eyewitnesses, the testimony of most witnesses having been submitted either by affidavit, by deposition, or in the form of an agreed-upon narrative of testimony given in earlier criminal proceedings, and a vast number of documents having been introduced which bore on the question for decision. In any event, the General Motors Court concluded that it resorted to the record not to contradict the trial

court's findings of fact, but to supplement the trial court's factual findings in order to assist this Court in determining whether the findings of fact supported this Court's ultimate legal conclusion that there was no conspiracy. See also, United States v. E. I. Du Pont de Nemours & Co., 353 U.S. 586 (1957); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

Both the District Court and the Eighth Circuit Court of Appeals held that in order to deny recognition to Respondent organization, the standard established by this Court in Brandenberg v. Ohio, 395 U.S. 444 (1969) and applied to the issue of recognition of a student organization in Healy v. James, 408 U.S. 169 (1972), is that the advocacy or actions of the organization must be "directed to inciting or producing imminent lawless action and is likely to produce such action." The Healy Court held that

recognition can be denied an organization only when it infringes reasonable campus rules, interrupts classes, or substantially interferes with the opportunity of other students to obtain an education. There was no allegation or finding made by the District Court as to whether the Respondent organization broke campus rules, disrupted classes, or interfered with the educational process as such. Furthermore, there was no finding made that the Respondent organization advocated imminent lawless action or that such advocacy was likely to produce the same. This Court's decision in the Brandenberg case has a twofold thrust--first, one must advocate or incite imminent lawlessness; second, the advocacy must likely produce such action. Absent a finding as to advocacy or incitement, the District Court could not uphold the denial of recognition under the Brandenberg standard.

Assuming arguendo that Brandenberg does not require advocacy plus the likely production of lawless action, the District Court could not reasonably infer from the testimony adduced that lawless action would result from the exercise of associational rights which derive from recognition of Respondent organization. The District Court based its finding that recognition of Respondent organization would produce imminent lawlessness solely upon the testimony of its two expert witnesses. It was this testimony that the Court of Appeals reviewed as either "ultimate fact" or "fact-legal." The very question of "imminent lawlessness" is so closely intertwined with the testimony of the expert witnesses that to cede the sole right of decision to the District Court under Rule 52(a) of the Federal Rules of Civil Procedure would violate the Court of Appeals' responsibility to

safeguard the application of this very sensitive area of the law.

Respectfully submitted,

LAWRENCE P. KAPLAN
On Behalf of the
American Civil Liberties Union
of Eastern Missouri
7711 Carondelet Ave., Suite 500
St. Louis, Missouri 63105
Attorney for Respondents

CERTIFICATE OF SERVICE

I, Lawrence P. Kaplan, attorney for Gay Lib, et al., Respondents herein, hereby certify that on the 1st day of December, 1977, I served a copy of this document on the Petitioners herein by mailing a copy in a duly addressed envelope with first class postage prepaid to:

Jackson A. Wright, 227 University Hall,
Columbia, Missouri 65201